

March 21, 2016

National Governors Association
444 North Capitol Street NW, Suite 267
Washington, D.C. 20001-1512

Dear Governors:

The Supreme Court recently issued a nationwide stay of the Obama administration's misleadingly-named "Clean Power Plan" (CPP), a massive regulatory plan that *will not* have a meaningful impact on global emissions but *will* punish your states' most vulnerable citizens and ship middle-class jobs overseas. The court's action in *State of West Virginia et.al. v. EPA et.al.* will likely extend well beyond this administration, providing a welcome reprieve to states while simultaneously underlining the serious legal and policy concerns I wrote you about last year. In that letter I advised you to carefully consider the significant economic and legal ramifications at stake before signing your states up to a plan that may well fall in court, given that it was unclear — in my view, unlikely — such a plan could survive legal scrutiny.

Many characterize the Supreme Court's recent decision as unusual and unprecedented, which says a lot about the unusual and unprecedented nature of the CPP. President Obama's desire to unilaterally reshape your state energy policies around his own ideological view rather than an evidence-based one is well-known, but what is surprising is the fact that he thought he could do so without getting legislation through Congress. In 2009, President Obama tried to push legislation through Congress to create a national energy tax. After this proposal failed to pass Congress, the administration argued it has the authority it needs to bring about the same result under an obscure, almost half-century old provision of the Clean Air Act. Yet while many Clean Air Act experts say this claim is far-fetched at best, the administration moved the CPP forward anyway, and on an expedited basis, so it could show off its unworkable and likely-illegal plan in Paris.

In my earlier letter, I warned that the administration had designed the CPP to accomplish its political and ideological goals regardless of whether the plan itself failed to survive a lengthy legal battle. The administration was evidently hoping that states would be so far down the road in developing their compliance plans that they would be committed to those plans before the legal issues surrounding the CPP could be resolved. It is the same strategy this administration followed with the Mercury and Air Toxics Standards (MATS) regulation. While the Supreme Court ultimately struck down the MATS regulation, the damage had already been done; states, citizens, and businesses had already faced irreparable harm.

This is precisely why I suggested a "wait-and-see" approach with respect to the CPP last year. Given the Supreme Court's recent stay of the CPP, and the painful lessons of MATS, "wait-and-see" remains the most responsible approach today. The Court granted five separate stay motions in its decision, including a request to "[extend] all compliance dates by the number of days between publication of the

rule and a final decision by the courts, including this Court, relating to the rule's validity."¹ In other words, even if the CPP is ultimately upheld, the clock would start over and your states would have ample time to formulate and submit a plan; but if the court overturns the CPP as I predict, your citizens would not be left with unnecessary economic harm. Nor would your states be left with responsibility for billions in unnecessary investment obligations.

Now that the Supreme Court has halted implementation of the CPP, focus will shift back to the D.C. Circuit Court of Appeals. I recently joined more than 200 of my colleagues in both the Senate and House of Representatives, collectively representing more than 40 states, in filing an amicus brief in support of the states challenging EPA's rule. Our brief makes three main points:

1. The administration ignored the Clean Air Act's clear intentions that power plants not be subject to duplicative regulation under both the Emission Standards for Hazardous Air Pollutants and the Existing Source Performance Standards;
2. The administration imposed a plan with enormous costs for Americans and hardly any meaningful environmental benefits; and
3. The administration unlawfully assumed powers Congress did not grant it by establishing a de-facto cap-and-trade program despite Congress' past rejection of such a scheme.

The final resolution of these and other important questions about the lawfulness of the CPP will not be decided until next year at the earliest. But here is what we know: a majority of states now believe this plan to be unlawful, unnecessary, and prohibitively costly; a majority of the people's elected representatives agree, with both the Senate and House of Representatives voting last year to overturn the CPP; and that President Obama will not be in office long enough to implement his plan regardless of what the courts decide. As I noted in my letter to you last year, declining to go along with the administration's legally dubious plan will help provide the other two branches of government time to address many of the unanswered questions about this plan without putting your state at risk in the interim.

Moving forward, I hope that each of you will consider taking advantage of the relief granted by the Supreme Court and keep in mind that many of us in Congress stand ready to help you as you fight for the best interests of your states.

Sincerely,



MITCH McCONNELL
U.S. Senate Majority Leader

¹ Application of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review (Jan. 27, 2016) available at: <http://www.ago.wv.gov/publicresources/epa/Documents/L.pdf>.